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In the Supreme Court of the United States

October Term, 1978
No. 78-1099

J. MARQUEZ, Superintendent,

Petitioner,

v.

LAWRENCE S. BITTAKER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PRELIMINARY STATEMENT

Petitioner requests leave of court to submit the following reply memorandum pursuant to rule 24(4) of the Rules of the Supreme Court. This memorandum is submitted in reply to arguments raised in "Respondent's Brief in Opposition." There will be no attempt to repeat the arguments raised in the Petition for Writ of Certiorari but rather only new issues raised by the Brief in Opposition will be discussed.

ARGUMENT

I.

THE NINTH CIRCUIT HAS CREATED IN EFFECT TWO BODIES OF FEDERAL LAW BY APPLYING THE PRE-*FARETTA* LAW OF ITS CIRCUIT INSTEAD OF REACHING THE ISSUE OF THE RETROACTIVITY OF *FARETTA v. CALIFORNIA*, 422 U.S. 806 (1975).

Respondent alleges that the Ninth Circuit could properly rely on the pre-*Faretta* rule relating to self-representation instead of reaching the issue of the retroactivity of *Faretta v. California, supra,* 422 U.S. 806 (1975) since it was interpreting federal law. (Resp. Br. in Opp., pp. 6-8.) However, the Ninth Circuit in effect has created two bodies of federal law.

The purpose of the federal courts is to interpret and implement federal law. There can only be one body of federal law. At the time the Ninth Circuit decision in this case came down, the only federal law of self-representation then was the *Faretta* decision. Therefore the Ninth Circuit after *Faretta* came down, in order to determine whether or not a person could claim the right of self-representation before *Faretta,* had to interpret *Faretta* on the issue of retroactivity. This is because *Faretta* is the only federal standard enunciated by this Court on that point. The Ninth Circuit law of self-representation would be irrelevant after *Faretta* came down. To allow that body of law to exist along with *Faretta* would mean there would be two bodies of federal law applicable to self-representation which is an impossibility, namely, the Ninth Circuit law and *Faretta.* As such, once *Faretta* came down, the sole issue relative to whether or not self-representation existed as a constitutional right before *Faretta* was the question of retroactivity of *Faretta.*

Miranda v. Arizona (1966) 384 U.S. 436, held the police had to give certain constitutional rights to suspects in custody before they could be interrogated. This Court also held that *Miranda* would not be retroactive to trial beginning before June 13, 1966, the date *Miranda* was decided. (*Johnson v. New Jersey* (1966) 384 U.S. 719.) If, for example, before *Miranda* came down, one of the Circuits had held that rights as required in *Miranda* had to be given to suspects in custody before they could be questioned, a problem would arise in light of the *Johnson* decision. It would be anomalous to say the Circuit formulating the "Miranda rules" before *Miranda* came down could impose their interpretation on pre-*Miranda* state judgments by habeas corpus based upon that Circuit's (pre-*Miranda*) law in the face of the *Johnson* decision. To say otherwise, would mean there would be two contrary bodies of federal law, one national standard holding *Miranda* was not retroactive and the second within one Circuit applying that Circuit's pre-*Miranda* ruling to state judgments. Thus, the decision of the Ninth Circuit in this case is repugnant to the concept that there can be only one federal law. As such, the logical conclusion of respondent's argument, which would in effect create diverse bodies of federal law, should be additional grounds for granting certiorari.

Since *Faretta* has come down, it is the sole federal standard of self-representation. A lower federal court in determining whether or not a constitutional right of self-representation existed before *Faretta* must do so only in terms of retroactivity of that decision. Any other type of interpretation would create multiple bodies of federal law which cannot exist.

II.

SELF-REPRESENTATION HAS NOT ALWAYS BEEN RECOGNIZED AS A CONSTITUTIONAL RIGHT.

Respondent urges that the issue of retroactivity of *Faretta* need never be reached as self-representation has always been recognized as a constitutional right, and as such no new rule was created in that decision. (Resp. Br. in Opp., p. 13.) In *United States v. Peltier* (1975) 422 U.S. 531, 533, the court noted that the Ninth Circuit has held that the issue of the retroactivity of the doctrine of *Almeida-Sanchez v. United States* (1973) 413 U.S. 266, need never be reached because its holding relative to roving border patrols has always been the law. However that court held in *Peltier* at pages 535 *et seq.* that the *Almeida-Sanchez* doctrine would not be retroactively applied, thus impliedly rejecting the concept of the "old law-new law" distinction in terms of retroactivity.

Anyway the *Faretta* decision itself rejects the contention that self-representation was always a recognized constitutional right even before that decision came down. Justice Stewart writing for the majority noted that the question of whether or not there was a constitutional right to self-representation was "not an easy question." (*Faretta v. California, supra,* 422 U.S. 806, 807.) In addition, Justice Stewart aptly stated at pages 832 and 833 of the *Faretta* decision:

> "There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial. And a strong argument can surely be made that the whole thrust of those decisions may inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant." (Citations and footnote omitted.)

Furthermore contrary to respondent's allegation, a constitutional right of self-representation has never been recognized in California before *Faretta*, as noted by the California Supreme Court in *People v. Windham,* 19 Cal.3d 121, 126; 133 Cal. Rptr. 8, 11; 560 P.2d 1187, 1190 (1977) *cert. denied,* 434 U.S. 848 (1977).

As such, the question of retroactivity of *Faretta* should have been reached. For the reasons set forth at pages 14-17 of the Petition for a Writ of Certiorari, it is urged that the *Faretta* doctrine should not be held retroactive.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, and the supplement thereto, petitioner submits that a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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